Supreme Court, U.S.
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No. 99-2029

In The

Supreme Court of the United States

BLUE SPRINGS FORD SALES, INC.,
BLUE SPRINGS FORD WHOLESALE OUTLET,
ROBERT DUDLEY, FRED GRAHAM, DON ISOM,

Petitioners,

vs.

VICKI GRABINSKI,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

The question presented by the Petition is not raised by the Eighth Circuit's ruling in that there certainly was not "uniform precedent" in the Missouri intermediate appellate courts on the issue of the scope of discretion in awarding attorney's fees. Under any circumstances, the Eighth Circuit's ruling was in strict compliance with even the most stringent standards for according deference to state intermediate appellate court decisions, so even if there were a conflict among the Circuits on such standards (which is quite doubtful) that issue is not presented by this case. The Petitioners also failed entirely to present to the Eighth Circuit their core argument here – that any ruling in favor of Ms. Grabinski would be both contrary to previous decisions of this Court and in conflict with decisions in other Circuit courts. Since the issue was not raised either by briefing or by the circumstances of the case, there was no discussion and no decision by the Eighth Circuit on the standard for weighing intermediate appellate court rulings in drawing conclusions about state law.

Petitioners refer to a total of three cases as establishing "uniform precedent" that a court has unlimited discretion in whether to award attorney's fees under R.S.Mo. § 407.025: *Kawin v. Chrysler*, 636 S.W.2d 40, 45 fn. 4 (Mo. banc 1982), *Carpenter v. Discount Motors, Inc.*, 652 S.W.2d 716 (Mo.App. 1983), and *Sunset Pools of St. Louis v. Schaefer*, 869 S.W.2d 883 (Mo.App. 1994). *Sunset* was never mentioned in Petitioner's brief in the Eighth Circuit, but in any event it involved a refusal to award attorney's fees to a party for work on appeal when that party suffered an

important reversal on the appeal – obviously not a precedent supporting unlimited discretion to refuse to award fees. *Kawin* expressly stated that it was not a case under Chapter 407, and mentioned only in an informational footnote that § 407.025 gives plaintiffs a discretionary right to attorney's fees; it did not provide any discussion at all on the standard for awarding such fees and is simply inapposite. *Carpenter*, as discussed at length by the Eighth Circuit, was actually decided – and the appeal dismissed – on the ground of a lack of subject matter jurisdiction; any comments in the very brief *Carpenter* decision regarding fees were dicta. In sum, there is no "precedent" at all in Missouri courts regarding the issue of the standard of discretion for § 407.025 fees.

On the other hand, as the Eighth Circuit discussed at length, the post-*Carpenter* Missouri Supreme Court case of *O'Brien v. B.L.C. Insurance Company*, 768 S.W.2d 64, 71 (Mo. 1989) is "apposite authority" on this issue, and strongly indicates that that Missouri Supreme Court would apply the fee award discretion standards found in federal cases under 42 U.S.C. § 1988(b). (App. A-6). Similarly, the Missouri appellate courts have subsequently relied on such federal standards in considering fee awards under other Missouri fee-shifting statutes (*see Melahn v. Otto*, 836 S.W.2d 525, 527-8 (Mo.App. 1992), and *Hernandez v. State Board of Registration For The Healing Arts*, 936 S.W.2d 894, 902 (Mo.App. 1997).

Thus, the Eighth Circuit's holding concerning the standards for awarding fees under Missouri's § 407.025 is in fact based on "convincing" and "persuasive" data, and is consistent with the most stringent standards of deference to intermediate appellate opinions that might be

gleaned from this Court's decisions or those of any other Circuit. Even if there were a split in the circuits (and the Respondent submits that there is no such split worthy of note) this case does not present an example of a ruling that would vary from circuit to circuit.

In addition, the Petitioners said nothing whatsoever regarding this question in their brief before the Eighth Circuit. In fact, they never mentioned, in their brief or their petition for rehearing, *any* of the cases cited in this Petition on the issue of the weight to be given to intermediate state appellate court decisions. In their petition for rehearing they argued only that this ruling was contrary to previous *Eighth Circuit* precedents – they never mentioned decisions of the Supreme Court or from other circuits.

The Respondent respectfully submits that for the reasons set forth above the Petition should be denied.

Respectfully submitted,

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